Supreme Court, U.S.
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No. 91-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SEA-LAND SERVICES, INC.,

Petitioner,

—v.—

JOHN FANOLI and MOLLI FANOLI, his wife,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Section 905(b), enacted in 1972 as an amendment to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., Section 901-950), merely preserve to the Act's employees pre-existing general maritime negligence remedies, with the result that its language need not be analyzed by reference to established rules of statutory construction in order to determine upon whom right to sue for injury caused by the negligence of a "vessel" was conferred?

2. Does Section 905(b) permit a Longshore Act covered employee, who is neither a longshoreman, ship builder, repairman or breaker, to sue his or her employer for injury caused by the negligence of its vessel?

3. If such covered employee can sue, who are the employee's co-employees whose negligent acts establish Section 905(b) vessel liability?

4. In suit under Section 905(b) can the spouse of a covered employee recover damages for loss of society?

5. Can pre-judgment interest be added to a judgment for damages in a Section 905(b) case pursuant to the law of the State in whose courts the case is brought?

6. Can Section 905(b) cases be tried to juries?

7. Can a Section 905(b) suit be brought in the courts of the States?

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PETITION FOR WRIT OF CERTIORARI

Sea-Land Service, Inc. seeks a writ of certiorari to the Supreme Court of the State of New Jersey as a result of an order without opinion denying certification pursuant to the New Jersey Rules Governing Appellate Practice, R.2:2-1(b) and R.2:12, entered January 24, 1992 [1A].[1] Petitioner unsuccessfully sought discretionary review by the highest court of that State of the exclusively federal law issues considered in the opinion resulting in final judgment after appeal and cross-appeal of the Superior Court of New Jersey, Appellate Division, decided October 30, 1991, affirming and reversing the trial court in part and remanding for entry of judgment according to the jury's verdict. This opinion appears in 251 N.J. Super. 443, 598 A.2d 911 (N.J. Super. A.D. 1991) and is the only reported opinion in this case. It is reproduced in the Appendix. On May 21, 1989, the New Jersey Superior Court denied petitioner's summary judgment motion seeking dismissal of respondents' suit based upon 33 U.S.C. Section 905(a). On July 23, 1990, petitioner's motion for judgment notwithstanding the jury verdict, seeking dismissal on the same ground, was also denied. Both opinions also appear in the Appendix. The judgment in New Jersey Superior Court was entered August 1, 1990 [11a] and is based on a verdict returned on June 18, 1990 against petitioner awarding $950,000 damages on account of respondent, John Fanoli's personal injuries and $300,000 to his wife for loss of society, reduced to $50,000 by a reversed remittitur, to which prejudgment interest as provided by New Jersey statute (N.J. Civil Practice Rule 4:42-11(b)) was added after deduction of Longshore Act compensation benefits, paid and which continue to be paid, by petitioner as a result of John Fanoli's injury. Because compensation continues to be paid and

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1 Petitioner is a wholly owned subsidiary of CSX Corp. All bracketed references, including those to the relevant part of H.R. No. 92-1441, including "*Elimination of the Unseaworthiness Remedy*", as reprinted in 1972 U.S. Code, *Cong. & Adm. News*, pages 4701-4705, are to page numbers in the Appendix.

respondents "do not deny" petitioner's right to a "credit" for all such payments [3a], respondents have not submitted a new judgment since the amount cannot be fixed until date for satisfaction is agreed upon. Jurisdiction is based upon 28 U.S.C., Section 1257(a). The statutes involved are 33 U.S.C., Sections 902(21), 905(a), (b) and (c) and 933(a), which are also reprinted in the Appendix.

STATEMENT OF THE CASE

A) The Issue of Respondents' Right to Sue:

This suit seeks damages for personal injuries sustained June 27, 1986 by John Fanoli, a member of petitioner's shoregang and neither a seaman entitled to sue his employer under the Jones Act (46 U.S.C., Section 688) nor a longshoreman or ship repairman. He and his wife sue, pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901-950, alleging injury as a result of the negligence of a vessel, Section 905(b), Pub. L. 92-576, Section 18(a), 86 Stat. 1263 (1972) as amended, Pub. L. 98-426, Sections 4(b), 5(a)(1), (b), 98 Stat. 1641 (1984), an action which petitioner, injured respondent's employer, claims is barred by Section 905(a) making payment of statutory benefits its "exclusive liability"[2].

Petitioner operates manned merchant ships as well as unmanned barges. John Fanoli was injured while boarding one of these barges moored at petitioner's Port Elizabeth, New Jersey, marine terminal by means of a ladder, a form of vessel "gangplank", and the "rough dividing line" between

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2 Respondents never invoked the Jones Act. For the fact that the Longshore Act "focuses primarily on occupations" and what a longshoreman may be, see, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 246, 264, 273 (1977). At trial it was conceded that John Fanoli had not been "employed by the vessel to provide stevedoring services" (Section 905(b) second sentence) and the court ruled that he was not doing a longshoreman's work when hurt [34-35A]. This ruling was not appealed. In 1984 the statute's name was changed from "Longshoremen's" to "Longshore" and Harbor Workers' Compensation Act.

state and maritime jurisdiction (*Victory Carriers, Inc. v. Law*, 404 U.S. 202, 207 (1971)) where, under non-statutory maritime law overruled by Section 905(b) as part of the 1972 Amendments to the Longshoremen's Act (see, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974)), his suit for damages based upon the barge's "unseaworthiness" would *not* have been barred by former Section 905, in the event he had been found to have been doing the "traditional work of seamen"[3]. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Reed v. S/S Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967). Moreover, were that law still applicable, his wife would be entitled to damages for loss of society. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980). This petition raises issue of the right of a Longshore Act covered employee[4] who is not a longshoreman to sue his or her employer which is also a 33 U.S.C., Section 902(21) vessel for damages by virtue of Section 905(b), the first sentence of which provides for suit for vessel negligence *only* "as a third party in accordance with the provisions of Section 933 of this title" and the second for suit against such an employer *only* by longshoremen, i.e., ". . . person[s] employed by the vessel to provide stevedoring services"[5].

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3 Injured respondent relieved the cook aboard petitioner's manned vessels during their brief time at the pier. He was boarding the barge in order to inventory its cargo lashing gear, work which he testified was done aboard manned vessels by the ship's crew. In 1972, Section 905 was recodified as Section 905(a).

4 On account both of John Fanoli's status as a person engaged in maritime employment (33 U.S.C., Section 902(3)) as well as the situs of his injury. *Director OWCP v. Perini North River Associates*, 459 U.S. 297 (1983).

5 The question of a perceived inconsistency between the "obviously awkward" wording of the first and second sentences of Section 905(b) was considered in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266 (1979). In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531 (1983), statutory conflict was resolved on the basis of the "unambiguous" House Committee Report (H.R. No. 92-1441) which accompanied passage in 1972 of the Longshoremen's and Harbor Worker's Compensation Act amendments.

In *Jones & Laughlin Steel Corp. v. Pfeifer, supra*, it was held that a *longshoreman* can sue a statutory vessel which *is* his or her employer despite Longshore Act Section 905(a); and this was a right shared by ship builders and repairmen from 1972 until amendment of Section 905(b) in 1984 by virtue of which the latter categories of covered employees as well as ship breakers can no longer sue a vessel-employer[6]. Can a Longshore Act employee who is neither a longshoreman nor a ship builder, repairman or breaker sue his or her employer for vessel negligence? The correct answer is obviously "*no*". "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode" (*Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)); and since the Section 905(b) first sentence requires that suit be both "as a third party" and "in accordance with . . . Section 933" it cannot authorize suit against an employer since this is *not* in accordance with Section 933. Moreover, description of "a person employed by the vessel to provide stevedoring services" in the second Section 905(b) sentence is a denial of the right conferred upon directly employed longshoremen to other covered employees. *Ford v. U.S.*, 273 U.S. 593, 611 (1927). Nonetheless, the answer given by the courts has been "*yes*". In dealing with this question the language of Section 905(b) has been scrutinized in only *one* case, *Presley v. Healy Tibbits Construction Co.*, 646 F.Supp. 203 (D. Md. 1986); and in every other case it has merely been assumed that Congress in 1972 extended or "preserved" a right of *all* covered employees to sue an employer which is also a "vessel" for negligence under Section 905(b)[7].

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6 As enacted in 1972 the third Section 905(b) sentence provided: "If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel". The 1984 Section 905(b) amendment substituted a new third sentence barring suits by these categories of covered employees, and ship breakers, against employer-vessels irrespective of the circumstances of injury.

7 The issue of whether a non-longshoreman (or before 1984 a Longshoremen's Act employee who was neither a longshoreman nor a ship repairman) could sue a vessel-employer was first considered in *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2nd Cir. 1979). In that case

Respondents, who say their right to sue is based on the first Section 905(b) sentence, agree that suit *cannot* be maintained if, as petitioner claims, this sentence authorizes *only* "third party" suits, i.e., those which are brought against a vessel which is *not* the injured employee's employer; and they *concede* that as the phrase is commonly understood theirs is *not* a "third party" suit [39A]. This Court has, moreover, said what the Section 905(b) first sentence "as a third party" means, since it "addresses the recurring situation . . . where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern". *Edmonds*, *supra*, 443 U.S. at 263-264. Respondents do not assert right to sue by virtue of by Section 905(b) second sentence, which they claim establishes a "defense" in all suits against an employer, not just those which since 1984 can be brought, i.e., by a directly employed longshoreman, but, by required extension which the statute no where provides, in *their* case as well. It has been held that the second "is expressly addressed to the different and less familiar arrangement where the injured longshoreman . . . is employed by the vessel itself, not by a separate stevedoring company . . ."; and

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the court held that there was "no need to decide" whether plaintiff's decedent had been working as a ship repairman when killed or "at some other task". (604 F.2d at 796 n.7). In *Smith*, it was also held, by misplaced reliance on a longshoreman's case, *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), that the rights of a "Longshore Act employee" to sue for damages "are not dependent on who the employer is". (604 F.2d at 795). *Smith*, as a result, dealt with what the court mistakenly called Section 905(b) "immunity", not with the question whether a non-longshoreman, non-ship repairman could sue because that right was not challenged.

In *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980), the only other case where the language of Section 905(b) was ever considered in any way relevant to this petition, the vessel argued *only* that Section 905(b) was *inapplicable*. In that case the court said (1351 n.15) that the second and third Section 905(b) sentences "limit[ ] access to the negligence action" and that the second and third sentence enumeration of categories of covered employees was not "found in Section 905(b) with respect to employees to whom the negligence action is extended", i.e., in the statute's first sentence, which that court only supposed, without further scrutiny, gave *any* Longshore Act employee a right to sue a vessel-employer.

that "[t]he second sentence . . . makes it clear that . . . [an] . . . action [for damages] is authorized against the vessel even when . . . the longshoreman is employed directly by the vessel owner". *Jones & Laughlin*, *supra*, 462 U.S. at 530. Moreover, the second sentence of Section 905(b) has been said to "mean[ ] no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself". *Edmonds*, *supra*, 433 U.S. 256 at 266. Not decided is whether the first sentence of Section 905(b) addresses the "recurring" situation *only*; and whether the second does not just "make[ ] it clear" that suit for negligence may be brought by a longshoreman employed in the "less familiar arrangement", despite awkwardness of language, it is the *source* in the statute of the right of longshoremen—and since amendment to Section 905(b) in 1984, of all the Act's covered employees, only longshoremen—to sue a vessel-employer. This Court also has not considered what "in accordance with . . . Section 933" means. Longshore Act Section 933 as originally enacted required an election between compensation and suit against a third party (See, *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 604 n.13 (1981)); and since 1959, Section 933(a) has provided that a compensated employee "need not elect" subject to condition that he or she "determine[ ] that some person other than the employer . . . is liable in damages . . .". Respondents, however, deny that the first sentence of Section 905(b) *means what it says*. They argue that "as a third party in accordance with" is legislative "*fiction*" [39A] that all suits for vessel negligence are third party suits and in accordance with Longshore Action Section 933, since this first sentence language, which, in fact, restricts suits under this sentence to those brought against a vessel which is *not* the injured covered employee's employer, is "*simile*" [42A]!

There is another and more damaging way to mistake the conclusion that the Section 905(b) first sentence authorizes only third party actions and that suit since 1984 against an employer-vessel may be brought only by longshoremen by

virtue of the second—all that is required is that the courts avoid question of what the statute means altogether. This can be done by assuming that Section 905(b) merely "preserves a common [i.e., general maritime] law cause of action; it does not create one" [8A]; and on this basis conclude that the rule of *Reed v. S/S Yaka* and *Jackson v. Lykes Bros. Steamship Co., Inc., supra*, "s rvived" the 1972 Amendments, the negligence remedy being "preserved" to *anyone* covered by the Longshore Act injured as a result of vessel negligence. This view assumes that in 1972 permission was extended to all covered employees to sue for injuries caused by the negligence of the vessel, just as most Longshoremen's Act employees, including those who were neither longshoremen nor ship repairmen, when injured aboard ship prior to 1972 could sue for vessel unseaworthiness. This mistake is encouraged not only by the statute's use of the word "vessel" but also because of the Section 905(b) second and former third sentence incorporation of *some part of* the provisions of the first, since all three as originally enacted referred to "such person". No court has agreed with respondents' rendering of an Act of Congress on the basis of legislative "fiction" or "simile". But the courts, by concluding that Section 905(b) merely "preserved" and did not "create" the right to sue for vessel negligence, have assumed as correct an *even more* dubious legislative purpose—that Congress enacted a statute which merely acknowledges the continued existence of a negligence remedy established by non-statutory general maritime law.

Section 905(b) does *not* authorize a covered employee who is not a longshoreman to sue a vessel which is also his or her employer and this is so for the following additional reason: For the respondents' interpretation to be correct requires this Court *either* to interpret Section 905(b) in a way accepting a "harsh and incongruous result[ ]" (See, *Voris v. Eikel*, 346 U.S. 328 (1953)), whereby injured respondent has a superior right to sue for damages than longshoremen, whose work has been judicially recognized as "abnormally dangerous" (*Victory Carriers, Inc. v. Law, supra*, 404 U.S. at 218); *or* to create a defense in such a non-longshoreman's suit against his

employer which the statute does not provide, which this Court has held it *cannot do*. See, *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979). Petitioner will also show why Congress in 1972 *preferred* longshoremen, ship builders and repairmen and made what H.R. No. 92-1441 describes as "special provisions" for them *only* to sue an employer for vessel negligence. All petitioner's arguments were rejected by the courts of the State of New Jersey.

B) Proceedings in State Court:

On March 9, 1989, petitioner moved in New Jersey Superior Court for summary judgment dismissing respondents' complaint, asserting bar by virtue of Section 905(a) because John Fanoli was not a longshoremen and as a result his suit was not authorized by either the first or second sentence of Section 905(b). Respondents argued not only that first sentence authorized suit but also that a question of fact existed whether John Fanoli, at the time of his injury despite the nature of his employment generally, had been acting as a person "employed by the vessel to provide stevedoring services" and as a result was entitled to sue by provision of the second sentence of Section 905(b). By decision rendered orally May 21, 1989 petitioner's summary judgment motion was denied, not on the law but on account of existence of an alleged question of fact [29A]. Petitioner again moved to dismiss after ruling at trial that injured respondent had not been engaged in a longshoreman's work when hurt. In deciding this motion after the jury's verdict, the trial court, by oral decision July 23, 1990, held that the Section 905(b) first sentence authorizes suit for vessel negligence "regardless of the employer . . . employee relationship"; and that the "exceptions" which followed in the second sentence, and between 1972 and 1984 in the third, provided only that longshoremen and ship repairmen could not recover where the negligence causing injury was solely that of co-employee longshoremen or repairmen [40A]. The court so ruled although acknowledging that its statutory interpretation was not "completely consistent with good sense in view of the apparent intention of

Congress to limit liability of employers" [*Ibid.*] and despite the fact that support for petitioner's contrary view was based upon nothing "[e]xcept reason, except common sense and the purpose of Congress and some of the language" in *Edmonds*, *supra*, and *Jones & Laughlin Steel Corp.*, *supra* [39A]. Moreover, the court noted that it had ". . . combed the decisional law for some clear cut interpretation of this Section [905(b)] of the [United States] Code and none had been forthcoming" [*Ibid.*]; and that as a result it was required to resolve the issue of respondents' right to judgment on the "basics" [*Id.*]. Finally, the court, acknowledging that the question would be the subject of appeal, expressed the hope "maybe we will get the clarification which is lacking as of this time" [40-41A].

The New Jersey Superior Court, Appellate Division, in its October 30, 1991 opinion, said in error that ". . . both parties *seem to agree* that the real legal issue is whether Section 905(b) permits *an employee* to sue the vessel's owner when that owner is also the employee's employer" [5A, emphasis added]. This ignores the issue petitioner *and* respondents raised[8]. Having misdescribed the issue, the Appellate Division held that the question of right to sue was "clearly resolved by the continued existence of the *Reed* [*Reed v. S/S Yaka*, *supra*] doctrine" [7-8A]; and that petitioner's argument ". . . that the words 'vessel as a third party' shows a legislative intention to limit Section 905(b) claims to truly (*sic.*) third party actions" had to be rejected because "subsumed in the *Reed* issue" [6A (n.4)]. The Appellate Division also held that the language of the statute did not support petitioner's "longshoreman distinction" because the "first sentence of Section 905(b) clearly refers to person[s] covered by the Act" and "[h]ad Congress intended to mean longshoremen rather

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8 In its Brief in the Appellate Division petitioner (at page 16) informed the court that ". . . preservation of the rights of *longshoremen*, even to sue their employer, if also the vessel, is unquestionably part of the 1972 Amendments". In respondents' Appellate Division answering Brief (at page 13) it was said that after the 1983 decision of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, *supra*, acknowledging the right of a longshoreman to sue his employer "[t]he only issue that remained was whether the right . . . was limited to longshoremen".

than persons covered by the Act, it could easily have said so"[9] [7A]. Apart from its own "analysis", which throughout confused "an employee's" right to sue a vessel employer with that of a non-longshoreman to bring such a suit, the court deferred in what it acknowledged was an "uniquely federal area" to decisions of "knowledgeable [federal] courts" which "uphold a non-longshoreman's right to sue the employer-owned vessel" [7A]. In addition, the court held that petitioner was not entitled to a conditional new trial because it had "abandoned" contention that respondents' claim was "barred by the negligence of fellow servants" [3A], i.e., other shoregang members, because it had argued that the court had no right to imply in respondents' case a "defense" available in a longshoreman's case by virtue of the second sentence of Section 905(b). Just such was offered by *respondents* at trial but the court *ruled* that no such "defense" existed since nowhere provided for in the statute [33, 38A].

Petitioner moved on April 11, 1990 [30-31A] to strike respondents' jury demand based upon language in the majority opinion in *Monesson Southwestern R. Co. v. Morgan*, 486 U.S. 330 (1988), as that decision was unofficially reported in the advance sheet of the United States Supreme Court Reports Lawyers' Edition[10]. This motion was denied and the Appellate Division affirmed. Petitioner sought dismissal of the complaint of respondent, Molli Fanoli for the first time upon appeal, this Court's decision in *Miles v. Apex Shipping Co., Inc.*, 498 U.S. __, 112 L.Ed. 2d 274 (1990), being handed down between entry of judgment and appeal to

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9 This, obviously, begs the issue, as the Appellate Division surely realized. Petitioner, of course, never contended that only longshoreman had the right to sue a Section 905(b) vessel "as a third party" [35, 43A].

10 According to the advance sheet Lawyers' Edition (soft cover volume, No. 2, dated July 20, 1988, p. 362), the Court's *Monesson* decision read as follows:

> "Of course, because there is no right to a jury trial in LHWCA actions, the 'trier of fact' in *Pfeifer* was a judge rather than a jury".

The official report of the *Monesson* opinion does not suggest that Section 905(b) cases must be tried non-jury.

the Superior Court, Appellate Division. Pursuant to New Jersey Rules Governing Appellate Practice, R:2:10-5, and also by virtue of *Thorp v. Housing Authority*, 393 U.S. 268, 281 (1969), the appellate court was required to consider the issues based upon law existing at the time of its decision, as opposed to at trial. It rejected petitioner's contention that Section 905(b) does not allow recovery of damages for loss of society. Just as implicitly the court had so held in deciding the right to sue issue, this holding was explicitly based upon the mistaken preliminary view that "Section 905(b) preserves a common law cause of action; it does not create one" [8A]; and, were the premise true, upon a correct ruling (see, *American Export Lines, Inc. v. Alvez*, *supra*), that in a general maritime law damage suit arising from shipboard injury ". . . absent a statute created limitation, courts will not bar the right of a dependent to bring a derivative claim" [*Ibid.*].

Respondents' right to pre-judgment interest was challenged after submission by respondents of a judgment after trial adding such interest pursuant to New Jersey statute. Petitioner moved to deny pre-judgment interest by reason of federal preemption, arguing that because in *Monesson Southwestern R. Co. v. Morgan*, *supra* this Court had held that state law providing for pre-judgment interest inapplicable in a Federal Employers' Liability Act case ("FELA", 45 U.S.C., Section 51-60) and, hence, in a Jones Act case, that it would hold adding pre-judgment interest by virtue of New Jersey statute to be improper in a Section 905(b) suit as well [45A]. In opposing this argument respondents claimed that pre-judgment interest was available in Section 905(b) cases, although acknowledging that such interest cannot be awarded under maritime law on future losses. The verdict in this case was returned generally and because "there's no way to sort out" the verdict, the trial court in its July 23, 1990 decision added pre-judgment interest to "all parts of the award" pursuant to "our rule", i.e., R. 4:42-11 [41A]. The Appellate Division affirmed, holding that the "precise argument" made by petitioner had been rejected in *Randolph v. Laeisz*, 896 F.2d 964, 968, 969 (5th Cir. 1990), which the Appellate Division said was a case where "award of pre-judgment interest

under Texas law in a . . . [Longshore Act] . . . action", once again, had been "upheld"[11] [8A]. The Appellate Division also held that "the discretionary right to award prejudgment interest is generally recognized" [*Ibid.*] although *not* so recognized in 28 U.S.C., Section 1961.

ARGUMENT

Where resolution of a question of federal law turns on a statute and the intention of Congress the courts look first to the statute's language and then to the legislative history if the language in unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). The 1972 Longshoremen's Act amendments are not remedial and, instead, balanced the interests of both employees and employers. *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). The *first* sentence of Section 905(b) from which respondents' right to sue supposedly arises states ". . . the employer shall not be liable to the vessel for such damages directly or indirectly . . ." which establishes that this sentence applies only to suits brought in the "recurring" or tripartite situation where prior to 1972 the stevedore-employer (*Ryan Stevedoring Co., Inc. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956)) and, indeed, the employer of non-longshoremen employees hurt aboard ship (*Fairmont Shipping Corp. v. Chevron*, 511 F.2d 1232 (2nd Cir. 1975)), was liable to indemnify shipowner in the event injury resulted from the independent contractor's breach of warranty of workmanlike performance. Confusion is, however, possible upon reading the second and former third sentences together with the first, which considered alone is *not* unclear. But these sentences need not be seen as creating a defense in a directly employed longshoremen's or ship repairmen's suit which is authorized by the first sentence. The words "such person" in the first Section 905(b) sentence appear after only status as a covered employee and injury on

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11 The case actually holds that in Section 905(b) suits a court or a jury is free to calculate interest at the *rate* provided by law of the forum state. See also, *M&O Marine, Inc. v. Marquette Co.*, 730 F.2d 133 (3rd Cir. 1984).

account of vessel negligence is identified. The second sentence "such person" is one "employed by the vessel to provide stevedoring services to the vessel", i.e., a longshoreman employed directly by shipowner, who, for that reason, cannot sue the vessel either "as a third party" or "in accordance with" Longshore Act Section 933. The statute's sentences can be harmonized as establishing separate rights to sue without need even to suspect that the first authorized all Longshore Act employees to sue an employer-vessel; if *only* the second (and former third) sentence "such person" is that person *to the extent described* where in the first sentence the phrase appears. Thus, Section 905(b) can be read as authorizing longshoremen (and in 1972 ship builders or repairmen) to sue a vessel employer, not by virtue of Section 905(b) first sentence, but, instead, because Congress made "special provisions" for these employees, avoiding what otherwise would be the barring effect of Section 905(a), in the second and former third sentences[12].

Nonetheless, in *Presley v. Healy Tibbits Construction Co.*, *supra*, 646 F.Supp. at 208 n.3 it was said that argument, made "in passing" by a Section 905(b) vessel-employer sued by a pile driver hurt on a construction barge, that "the first sentence as a whole was directed only to the traditional tripartite relationship . . ." was not compelled as a matter of "grammatical necessity". In addition, the *Presley* court (646 F.Supp. at 207, emphasis added), although correctly observing that the "first *sentence*" of Section 905(b) "generally conferred upon 'a person [who suffers injuries] caused by the negligence of a vessel' the right to bring a third party action against a vessel", next concluded that "[t]herefore, on its face the first *section* (*sic.*) of Section 905(b) entitles plaintiff to bring this suit". However, the conclusion does not follow that the first *sentence* (as opposed to "section") authorizes

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12 Also problematic perhaps is the second sentence provision that "no such action" be permitted. This, however, is linked to the "such person" who can bring it but *not* to every requirement of the "action" which the first authorizes, which cannot result in imposition of damages against an employer by virtue of that sentence's concluding clause. Thus, "such action" means a negligence action, only.

any covered employee to sue a vessel whether or not a third party; and reliance on the first Section 905(b) "*section*", i.e., "[I]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel", represents treatment of the next following language "as a third party in accordance with . . . Section 933" as surplusage. This is never proper. See, *Pettis ex rel. U.S. v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 673 (9th Cir. 1978); *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2nd Cir. 1985). The *Presley* interpretation by deletion is mistaken because no court may disregard statutory requirements simply because it considers them redundant (*Commissioner of Internal Revenue v. Gordon*, 391 U.S. 83, 93 (1968)); and it is a "grammatical necessity" to at least read the first sentence of Section 905(b) as a whole. The *Presley* court ignored the statute's first sentence "as a third party" provision and treated an employee's suit as though it were against a third party; and the court failed to mention the "in accordance with" Section 905(b) first sentence language *at all.*

The *Presley* justifications for the result achieved are also infirm. It was said (646 F.Supp at 207) that the "such person" in the Section 905(b) second (and former third) sentences "clearly refers back to the 'person' mentioned in the first sentence", as, of course, it does. But as already been shown it can "refer[ ] back" to only the "person covered under the chapter" whose injury was "caused by the negligence of a vessel" and not to such person so injured who may sue the vessel "as a third party in accordance with . . . Section 933". It is the assumption that the second sentence refers back to everything in the first which *creates* discord. The rules of construction require that the courts read statutes as a whole (See, e.g., *U.S. v. Morton*, 467 U.S. 822, 828 (1984)) but in a way avoiding, instead of creating, inconsistency. See, *Citizens to Save Spencer City v. U.S. Environmental Protection Agency*, 600 F.2d 844, 870 (U.S. App. D.C. 1979). The second result justification offered in *Presley* was based upon H.R. No. 92-1441; the third upon the Senate Report, No. 98-

81 accompanying the 1984 amendment to the third sentence of Section 905(b).

In *Presley*, 646 F.Supp. at 207, that court said that "[t]he section of the House Report explaining the addition [in 1972] of the second and third [Section 905(b)] sentences confirms that they were intended to limit the right of longshoremen, ship builders and repairmen to sue not to create it". It so concluded despite the "anomalous effect" of this reading, "placing harbor workers other than longshoremen, ship builders and repairmen in a better position than longshoremen, ship builders and repairmen (the traditional *Sieracki* seamen) themselves". (*Ibid.* at page 208). By not refusing to "sail in occupied waters" (*Miles v. Apex Shipping Co. supra*, 112 L.Ed. 2d at 293), and when interpreting the Longshore Act ignoring the fact that "the wisest course is to adhere closely to what Congress has written" (*Rodriguez v. Compass Shipping Co., supra*, 451 U.S. at 617), the court failed to treat as conclusive its own determination that ". . . there is no express provision pertaining to such harbor workers which imposes a limitation comparable to those contained in the [Section 905(b)] second and third sentences". *Id.* The view that the second and former third sentences were intended as limitations requires that the right of any covered employee to sue even an employer for vessel negligence be established by virtue of the first Section 905(b) sentence, a result which can be achieved only by ignoring "as a third party in accordance with" completely. Nonetheless, the court supposed that Congress' *mistake* could be cured by ". . . generative statutory construction of the kind . . . appropriate to fill in interstices in the legislative scheme", with the result that ". . . a judicially crafted exception could be placed upon the first sentence of Section 905(b) to prohibit [recovery by] a harbor worker . . . for injuries caused by the negligence of a fellow employee performing similar work"[13] (*Id.*).

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13 Upon similar reasoning respondents claimed that any Longshore Act employee can sue his employer when negligence causing injury is "vessel related", by which they mean not related in this case to negligence by other shoregang members. Such an employee hurt aboard his employer's vessel

The problem with this too familiar judicial response is that it is clear from H.R. No. 92-1441 that, in fact, Congress made no mistake and, hence, no "judicially crafted exception" is warranted. The limiting language in the right of longshoremen today and ship repairers between 1972 and 1984 to sue a vessel-employer is reiteration, in the action the second and former third sentences separately authorized, of the limitation applicable when an employee sues the vessel "as a third party"; that employee and a directly employed longshoreman must establish injury "caused by the negligence of a vessel". No shipowner's liability can be established simply through proof of negligence causing injury by an independent contractor. However, since contractor negligence causing a condition of unseaworthiness made the vessel liable (see, *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971)), in H.R. No. 92-1441, Congress, referring for simplicity only to "longshoremen" and only to those longshoremen permitted to bring third party suits, said "[t]he vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores . . ." [22A]. Because the Longshore Act "vessel" definition (Section 902(21)) includes "said vessel's owner"—which could be said to establish Section 905(b) liability on a *respondeat superior* basis—the second and former third Section 905(b) sentences were phrased so as to make certain that a directly employed longshoreman or repairman would not have a *better* right to recover damages than if employed by an independent contractor. In the House Report section which the *Presley* court inaccurately quoted[14], it was also said as that court acknowl-

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while working in a capacity in which he alone served would face no bar to recovery based upon "fellow servant" negligence. *Smith v. Eastern Seaboard Pile Driving, Inc., supra*, held that all any employee need show is negligence of a vessel-employer committed by co-employees working in another capacity. 604 F.2d at 795. This "rule" has *not* been uniformly applied. See page 23, *infra*.

14 In a case where the vessel urged that the second and third Section 905(b) sentences were " 'special provisions' " the court in *Presley* , without ellipses, omitted the phrase "for special provisions" from the quoted section

edged that "[t]he Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor" as well as: "Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services" [24A]. In *Presley*, the court, although holding that this House Report language "confirms" that the Section 905(b) second and third sentences were intended to limit rights and not to create them, offered no justification for its conclusion that the "rights" to which Congress referred was a "limited" right to recover damages; instead of the right to sue, which these sentences, in fact, conferred. In addition, *Presley* offers no explanation why Congress allowed longshoremen to sue a vessel employer; or why a directly employed *non*-longshoreman should supposedly have been given a superior right to recover damages than a directly employed longshoreman. Of course, that the second sentence—however awkward its language—was intended to enable only a directly employed longshoreman to sue his or her employer, and conferred a right to sue which otherwise would be barred, is certain in the event that the first establishes only third party rights. It is, surely, *not* proper statutory interpretation to assume that *if* the first sentence of the statute provided only that a covered employee could sue for vessel negligence, instead of on account of such negligence "as a third party in accordance with . . . Section 933", all discord would disappear. That "special provisions" were purposefully made for only those categories of covered employees mentioned in the second and former third Section 905(b) sentences is apparent from H.R. No. 92-1441.

In *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) it was held that Congress is "presumed to know" existing law when passing legislation. In enacting the second

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of the House Report. See, 646 F.Supp. at 207; compare H.R. No. 92-1441 [24A].

and former third Section 905(b) sentence Congress demonstrated that, in fact, it knew the existing law. In H.R. No. 92-1441, just before acknowledging need for "special provisions", it was noted—by citation of *Reed* and *Jackson*, *supra*—that this Court had "held that the unseaworthiness remedy is available to the *injured employee*" [24A] (emphasis added). That this remedy was available, not only to longshoremen but *anyone* hurt aboard ship while doing the traditional work of seamen, was made plain in *Jackson v. Lykes Bros. Steamship Co, Inc.*, *supra*, in which this Court noted that "other kinds of maritime employees, besides stevedores . . . were entitled to . . . seaworthiness protection . . ."; and that employees granted its benefit included "[c]arpenters . . . electricians . . . ship cleaners . . . repairmen . . . and . . . riggers" (386 U.S. at 734 n.4). H.R. No. 92-1441 demonstrates that Congress was *aware* that the right to sue a vessel employer under the then-existing law did *not* depend upon being a longshoreman or a ship repairman. Yet it was the "rights" of only *these* employees that Congress said ". . . should not depend on whether he is employed by the vessel or by an independent contractor". There can be no doubt that the "rights" to which Congress referred was the right of directly employed longshoremen and ship repairmen to sue for damages on account of *non*-third party vessel negligence. H.R. No. 92-1441 tracks Section 905(b) exactly. In the paragraph beginning under the heading *Elimination of the Seaworthiness Remedy* [19A], in which the issue of ". . . the liability of vessels, as third parties, . . ." is introduced and in the paragraph concluding discussion of this issue just before explaining rejection of "the doctrine of the *Ryan* case" [23A]—all of which precedes discussion of the need for "special provisions"—it refers to liability of vessels "as a third party". There *was no* Congressional mistake in not similarly "limiting" the rights of other Longshore Act employees; Congress did not authorize others to sue and for that reason provided in 1972 no "fourth" Section 905(b) sentence providing a similar "defense" in case they should[15]. Why

15 Utterly wrong is the final *Presley* result justification, based upon the 1984, as opposed to the 1972, amendments' congressional document. In the

Congress provided, instead, for suits against vessel employers only by longshoremen and ship repairmen is not obvious.

Because this Court has recognized that loading and unloading of vessels is work more often performed by independent contractors it is certain that their interests were not underrepresented during lobbying prior to passage of the 1972 Amendments to the Longshoremen's Act. The industry's first proposal (S. 525, 92d Cong. 1st Sess., Sec. 1, (1971)) provided that vessels be designated as co-employers of all covered employees hurt aboard ship. See, *Edmonds*, *supra*, 433 U.S. 256, at 265 n.12. This would have barred all suits, with the result that the existing ability of contractor stevedores to compete for work would not have been affected. It was how to achieve this result although rejecting the industry's co-employer proposal which was an essential aspect of "[o]ne of the most controversial and difficult issues which the committee has been required to resolve", which H.R. No. 92-1441 describes as ". . . the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations"[16] [19A]. Why in 1972 Congress

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Presley court's view legislative history is not a source of understanding of an unclear federal enactment it is *authority*. But what the Ninety-Eighth Congress in amending Section 905(b) in 1984 thought the Ninety-Second meant in enacting the statute in 1972 is irrelevant. Nonetheless, the *Presley* court found that the "legislative history of the 1984 amendments . . . strongly supports plaintiff's position that the first sentence of Section 905(b) confers upon all persons covered by the . . . [Longshore Act] . . . a right to bring a third party action (*sic.*) against the employer/vessel", since the Ninety-Eighth Congress "[i]n reviewing the 1972 amendments . . ." stated that "negligence actions were allowed against the employer/vessel, (see first sentence of . . . Section 905(b))" and that "the 'scope of the actionable negligence was narrowed' by the second and third sentences". *Presley*, *supra*, at page 209, n.4. See also, Senate Report No. 98-81 (1984).

16 After so describing the issue and following two intervening sentences noting the initial industry proposal and its rejection, the House Report [19A] states the Committee's belief "that where a longshoreman *or other worker* covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages *as a third party*". (Emphasis added). This establishes that the statutory language "as a third party" means exactly the same thing as "the liability of vessels, as third parties, . . ." and that the

authorized suits by directly employed longshoremen and ship repairmen against a Section 905(b) vessel becomes apparent when considered in light of what third party actions achieve. The liability of an employer such as a stevedore ". . . is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less". *Edmonds*, *supra*, 443 U.S. at 269. And it is widely believed that its lien establishes an employer's right to "go scot-free", avoiding all liability for compensation even when overwhelmingly responsible for the occurrence of its employee's injury. See, *Edmonds*, *supra*, 443 U.S. at 274 (dissenting opinion, Blackmun, J.). Were no "special provisions" made for suits by such longshoremen in 1972, vessels would have achieved the same result denied them by *Reed*—limitation of liability to compensation by virtue of Section 905(a). For this reason, shipowners, to whom an independent contractor stevedore's compensation insurance costs are passed on, would have, in order to avoid Section 905(b) third party suits, employed longshore and vessel repair labor directly; or so *surely* independent contractor stevedores and ship repairers would have feared. Hence, in 1972 they would have had reason to *insist upon* addition of Section 905(b) second and third sentence special provisions no matter how sacred—*when applied to them*—Section 905(a) "exclusive liability" was supposed to be. There was no need to make similar provision for other harbor workers, those unlike longshoremen and ship repairmen who traditionally have been directly employed or whose work has never been recognized as being "abnormally dangerous".

It is a fundamental rule of statutory construction that an act of Congress must be interpreted in light of the "mischief" it was designed to correct. See, *McDermott Intl., Inc. v. Wilander*, 498 U.S. __, 112 L.Ed. 2d 866, 878 (1991). This mischief was identified in *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). The 1972 Amendments were enacted to make statutory payments the primary source of employee

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Section 905(b) first sentence applies to *all* Longshore Act employees but creates *only* third party rights.

compensation; and to conserve employer assets necessary to pay increased benefits by reducing litigation by elimination of the unseaworthiness remedy *and* restoration of the employer's exclusive liability defense. Moreover, respondents' interpretation of Section 905(b) runs counter to "the broad goals which Congress intended to effectuate" in enacting the 1972 Amendments and allowing this suit as a result is not proper ". . . in the absence of an unmistakable directive" (*Federal Trade Commission v. Meyer*, 390 U.S. 341, 349 (1968)); and it *surely* cannot be said that Congress in 1972 unmistakably permitted all covered employees to sue a vessel employer.

REASONS FOR GRANTING WRIT

The reason Section 905(b) has not been correctly interpreted is more important than the fact that the statute has been misread—the courts deny Sections 905 and 902(21) the force of statute. That Section 905(b) "preserves" a general maritime law negligence right and does not "create" a new remedy has been invoked to deny removal pursuant to 28 U.S.C. Section 1441(a) based upon federal question (*Giacona v. Capricorn Shipping Co*, 394 F.Supp. 1109 (S.D. Texas 1975); to deny trial by jury (*Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71, 72 (5th Cir. 1980)); to bar suit by a ship builder hurt on a floating drill rig under construction on land by insisting that the Section 905(b) "vessel" be in navigable waters (*Richendollar v. Diamond M. Drilling Co., Inc.*, 784 F.2d 580 (5th Cir. 1986), rev'd *en banc*. 819 F.2d 124, 128 (5th Cir. 1987)); and to justify continuation of the rule of *Reed v. S/S Yaka*, *supra*, in a case brought by a non-longshoreman, upon holding that "*Reed*-type actions, though limited to. . . negligence, survived [as opposed to *are provided for by*] the 1972 Amendments" (*Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987)). Moreover, the courts allow recovery of pre-judgment interest because "Section 905(b) suits are general maritime [law] cases." *Randolph v. Laeisz*, *supra*. Most recently, in *Robertson v. Arco Oil and Gas Co.*, 766 F.Supp. 535, 537

(W.D. La. 1991), it was said: "Section 905(b) does not create a new or broader admiralty remedy; it merely codifies existing nonstatutory general maritime negligence remedies . . . and extends them to offshore workers"[17]; and that: "It must be remembered that the Section 905(b) action is merely an action for maritime negligence, indistinguishable from an action by passengers or . . . visitors on a ship"! *Id.* at 539.

The rights the statute creates are said, in Section 905(b) itself, to be the "exclusive remedy", not only of the person injured, but also "anyone otherwise entitled to recover damages by reason thereof". In *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404, 412-413 (1969), this Court held that "exclusive remedy" language appearing in a statute cuts-off pre-existing non-statutory rights. In addition, H.R. No. 92-1441 shows that in 1972 Congress intended disputes arising in suits under Section 905(b) be decided "as a matter of Federal law", into which was to be incorporated "admiralty concepts" of comparative negligence and bar to defense of assumption of risk [24-25A]. A vessel's liability was to be the same as a "land-based third party"; and the law was to be developed after 1972 on a case-by-case basis, instead of by resort to general maritime negligence principles other than those specifically mentioned [23A]. But what is important is not whether Section 905(b) is maritime law (it is) or whether its remedy is "new" (negligence is old) but what it provides and that it *is* exclusive. As a result, each of the just mentioned holdings reached upon assumption that the statute merely preserved what pre-existed may well be *wrong*. For example, the holding that "*Reed*-type actions, though limited to . . . negligence, survive[ ]

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17 Plaintiff in *Robertson* was an Outer Continental Shelf Lands Act ("OCSLA") employee. OCSLA, by virtue of 43 U.S.C., Section 1333(b), incorporates the Longshore Act, Section 905(c) of which in 1984 gave OCSLA employees the right to sue a vessel for negligence ". . . in accordance with . . . Section 905(b) . . .". See, Pub. L. 98-426. For this reason, who may be entitled to bring a Section 905(b) suit against a vessel-employer as a practical matter is made more important. See, e.g., *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989), aff. in part and mod. in part, 929 F.2d 191, reformed, 934 F.2d 67 (5th Cir. 1991).

. . ." (*Kerr-McGee v. Ma-Ju Marine Services, Inc., supra*) is mistaken because prior to 1972 no Longshoremen's Act employee, even a longshoreman, could sue his or her employer for negligence; *Reed/Jackson* and, with that, avoidance of Section 905, applied to the abolished unseaworthiness remedy *only*. See, *Arvidson v. Dillingham Corp.*, 462 F.2d 1, 3 at n.6 (9th Cir. 1972)[18]. There is, of course, cost to order from ignoring the statute's language. *New v. Associated Painting Services, Inc.*, 863 F.2d 1205, 1209-10 (5th Cir. 1989) considered the often close question of whether a Longshore Act employee suing a vessel-employer was performing "maintenance" work (where in the mistaken view of the statute suit can be brought) or, instead, ship "repair" services, which case today is barred by virtue of the 1984 Section 905(b) amendment. In *Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528 (5th Cir. 1991), a Section 905(b) case brought by a heavy equipment operator against his employer, the court established rules governing liability in a cause of action which does not exist. In so doing, it ignored the fact that the employee, although hurt on a barge owned by a third party, was working "in connection with" his employer's tug, "any vessel" as Section 902(21) provides; and that injury resulted from alleged negligence of her master or crew, who are specifically identified in Section 902(21) as the statutory vessel[19].

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18 In *Edmonds, supra*, 443 U.S. 256 at page 264, n.13 this court remarked that *Reed* and *Jackson* had allowed a directly employed longshoreman to sue for "unseaworthiness and negligence". H.R. No. 92-1441 shows that Congress knew otherwise—that this Court had "held . . . unseaworthiness . . . available to the injured employee" [24A]—*and* that it was creating a new remedy.

19 In *Levene*, negligence committed on the tug was excused because injury occurred on the barge over which the tug had no "control", and the absence of *one* of *two* possible bases for *liability* was mistakenly treated as a *defense*. In *Scindia Steam Nav. Co. v. de los Santos*, 451 U.S. 156, 167 (1981), the case upon which the *Levene* court purportedly relied, this Court said that Section 905(b) liability could be established for injury caused by an unsafe condition in an area under the shipowner's control *or* if it negligently "actively involves itself" in the work of Longshore Act employees. The *Levene* court ignored this and its distinction between negligence as an

If Section 905(b), whether or *not* a "new cause of action"[20], established a covered employee's "exclusive remedy", this Court must deny recovery for loss of society. Maritime law in 1972 denied the spouse of longshoremen hurt or killed aboard ship recovery because not permitted to the spouse of a seaman. *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963). In *Miles v. Apex*, *supra*, this Court held (112 L.Ed. 2d 275, 286, n.1) that "the 1972 Amendments to LHWCA have rendered *Gaudet* [*Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974)] inapplicable on its facts"; and that the Jones Act precluded recovery for loss of society. On the other hand, if Section 905(b) merely preserved a pre-existing remedy, damages for loss of society, since created by general maritime law since 1972 in absence of bar by statute, *must be* recoverable in a Section 905(b) case[21]. The analysis required with respect to recovery of pre-judgment interest where federal statute provides the remedy appears in *Monesson Southwestern R. Co. v. Morgan*, *supra*, 486 U.S. at 338-339; and in *Rodgers v. United States*, 332 U.S. 371, 373 (1947)). This too must be denied in Section 905(b) cases. Pre-judgment interest is also a "right" which has developed *since* enactment of Section 905(b) and justifying such awards upon maritime law principles is singularly

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"employer" and as a "vessel" rejects Section 902(21) completely. In the Longshore Act vessel seems to mean shipowner or others who control a vessel. The Act does not say what a vessel is; but since a ship builder can still sue a third party vessel by virtue of Section 905(b), it seemingly would include a ship under construction and its correct description might be found in 46 U.S.C., Sections 801, 868. If so, Section 905(b) created a very narrow right to sue when both negligence and injury occur on land which is new to maritime law.

20 As it was said to be in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, *supra*, 521 F.2d at 41.

21 *Robertson v. Arco*, *supra*, held to the contrary, however; and on the basis of "withered doctrine". If general maritime law no longer provides for damages for loss of society when no statute bars recovery, it is for this Court and not a district court to say so.

inappropriate[22]. Maritime law pre-judgment interest is based upon equity and is designed to fully compensate for special damages suffered between the casualty and trial. See, e.g., *Petition of The City of New York*, 332 F.2d 1006 (2nd Cir. 1964). It is denied in cases of "apportioned fault", i.e., where the accident victim was guilty of substantial contributory negligence. See, *Inland Oil and Transport Co. v. Ark-White Towing*, 696 F.2d 321, 328 (5th Cir. 1983); *Pulyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982). In a Section 905(b) case the person injured has little damages for lost wages, and none for medical expenses, being compensated for these "losses" when they occur. *Webster v. M/V Moolchand, Sethia Liners, Ltd.*, 730 F.2d 1035 at 1041 (5th Cir. 1984) required an employee awarded special "damages" as though he had received no compensation to repay his employer's lien with pre-judgment interest, although Section 905(b) suits do not consider *its* apportioned fault[23]. Where Congress enacts legislation which is silent as to whether the right conferred is triable by jury this Court considers this question, in part, on the basis of whether the remedy is one traditionally tried to juries. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). If the 1972 Amendments represented exercise by Congress of its power ". . . to alter maritime jurisdiction and reformulate substantive rules of liability . . ." as was held in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1245-46 (3rd Cir. 1977), it is for this Court to say if a Section 905(b) case can be tried to a jury. *Fitzgerald v. U.S.*

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22 Pre-judgment interest was denied in Jones Act cases in *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 973 (5th Cir. 1969) because although predicated upon "Federal statute . . . and upon maritime law . . . Title 28 U.S.C., Section 1961 is controlling". Contrary treatment of Longshore Act cases means that Section 905(b) suits are not governed by "Federal Law".

23 Awarding pre-judgment interest to a stevedore chiefly responsible for its employee's injury allows it to *profit* from its negligence if it is entitled to interest calculated, not from the time of each compensation payment, but on the total from the time of injury until judgment. See, *Barnett v. Sea-Land Services, Inc.*, 875 F.2d 741 (9th Cir. 1989).

Lines Co., 374 U.S. 16 (1963)[24]. Even the existence of the employer's lien on the proceeds of an employee's Section 905(b) suit depends upon "as a third party in accordance with" being simile or upon the correctness of the view that the statute merely preserved existing remedies[25].

CONCLUSION

With respect to whether Section 905(b) merely preserves a maritime law remedy and the issue of correct interpretation of Section 905(b), as well as whether suits under this federal statute can be brought in state court or tried to juries, petitioner invokes Supreme Court Rule 10.1(c), the courts of the State of New Jersey having decided questions of federal law which have not been, but should be, settled by this Court. With respect to recovery of damages for loss of society and pre-judgment interest petitioner also asserts that these questions have been decided in a way which conflicts with *Miles v. Apex*, *supra* and *Monesson Southwestern Ry Co. v. Morgan*, *supra*. The issue of whether a non-longshoreman may sue a vessel-employer—which, in fact, depends *only* upon

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24 True even when suit is brought in state court, assuming that an exclusive federal remedy allows access to state courts to be "sav[ed] to suitors". See, 28 U.S.C., Section 1333. The power of a state to provide a remedy where maritime law controls is a matter of the "reverse Erie" analysis whether the effect is to provide something which Admiralty denies. See, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 211 (1986).

25 The stevedore lien is said to be "equitable" and was created *only* because of the absence of a remedy of law. See, *The Etna*, 138 F.2d 37 (3rd Cir. 1943); *Fontana v. Pennsylvania R.R. Co., Inc.*, 106 F.Supp. 461 (SDNY 1952), aff'd *sub. nom Fontana v. Grace Lines, Inc.*, 205 F.2d 151 (2nd Cir. 1953). *Federal Marine Terminals*, *supra*, 394 U.S. at 412 held that a stevedore could sue a shipowner for its compensation liability because *its own* general maritime law right was not "cut off" by the Section 933 assignment provision, which unlike Section 905(b), does not contain requisite "exclusive remedy" language. In *Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529, 538 (1983) it was said in justification of result that *Federal Marine Terminals* was *not* overruled by the 1972 Amendments. A stevedore has a lien if it too can sue only by bringing a Section 905(b) action; which, when its employee has sued, it cannot do if not in accordance with Section 933(b). If Section 905(b) merely preserves remedies it has no lien.

whether or not the Section 905(b) first sentence provision "as a third party in accordance with" was intended by Congress as simile—is not the subject of conflict in the circuits, although the third circuit does not hold that Section 905(b) merely "preserves" the remedy and the second and fifth dispute what constitutes actionable negligence in such a case. More importantly, despite the fact that the judge-made law prior to 1972 imposed intolerable burden upon the courts and maritime industry the process of creating law rather than interpreting the statute continues, with the result, not only of likelihood of error, but also that this Court's precedent is not followed (see, *Randolph v. Laeisz*, *supra*); or the right result is achieved through inappropriate means (*Robertson v. Arco*, *supra*). In addition, the courts of the States and Congress are deprived of understanding of what rights to sue a vessel-employer Section 905(b) actually confers—the error that it merely preserved the remedy abolishes need to consider the statute. This view has been far too often invoked to expect that it will ever be abandoned by the courts of appeals. Twenty years of Section 905(b) suits which the statute does not permit is enough, no matter how Longshore Act employers have slept on their rights.

DATED: Newark, New Jersey
April 23, 1992

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY

C-463 September Term 1991

34,427

Filed Jan. 24, 1992

JOHN FANOLI, et al.,

Plaintiffs-Respondents,

—v.—

SEA-LAND SERVICES, INC.,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-146-90T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of January, 1992.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-146-90T5

Argued October 15, 1991—Decided October 30, 1991

JOHN FANOLI and MOLLI FANOLI, his wife,

Plaintiffs-Respondents,
Cross-Appellants,

—v.—

SEA-LAND SERVICES, INC.,

Defendant-Appellant,
Cross-Respondent.

Before Judges Bilder, Stern and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

Joseph T. Stearns argued the cause for appellant, cross-respondent (Kenny & Stearns, attorneys; Mr. Stearns, of counsel and on the brief).

Richard M. Winograd argued the cause for respondents, cross-appellants (Joseph A. Ginarte, attorney; Mr. Winograd, of counsel and on the brief).

The opinion of the court was delivered by
BILDER, J.A.D.

This is a personal injury case arising under the Longshore and Harborworkers' Compensation Act, 33 *U.S.C.A.* 901 *et seq.* Defendant Sea-Land Services, Inc. appeals from a judgment entered in favor of plaintiffs following a jury verdict which found defendant negligent, the injured plaintiff, John Fanoli (hereinafter "plaintiff"), free of negligence and

awarded damages of $900,000 to John and $350,000 to his wife, plaintiff Molli Fanoli. The judgment included prejudgment interest of $176,655.26. Plaintiffs cross-appeal the reduction of Molli's award to $50,000.

Sea-Land operates sea-going vessels from a terminal facility at Port Elizabeth which it also owns and operates. To furnish relief to members of the crews while ships are at Port Elizabeth, Sea-Land maintains shore gangs which relieve shore leave crew members and carry out such maintenance and other duties as they are directed to do on board ship. Plaintiff was employed as a member of a shore gang.

On the morning of June 27, 1986 plaintiff was injured while attempting to board the S.S. Chesapeake Trader, a barge owned by Sea-Land. Access to the barge was provided by a straight aluminum ladder which had been laid against the side of the barge from the dock below. The accident occurred when the ladder slipped to the side from its position at the top edge of the barge causing plaintiff and the ladder to fall to the pilings below. Plaintiff collected compensation from Sea-Land as his employer pursuant to § 904 of the Act and also instituted the instant negligence action against Sea-Land as owner of the barge pursuant to § 905(b) of the Act. Plaintiff does not deny defendant is entitled to a credit for the compensation payments pursuant to § 933 of the Act. The judgment appealed from gives such a credit.

In its brief, defendant described the appeal as involving "exclusively" issues of law and statutory interpretation; alleges the issues are controlled exclusively by federal law, more particularly the Act; and concedes that plaintiff was a harbor worker within the meaning of the Act. Prior to the trial, before the summations, defendant abandoned a contention that plaintiffs' claim was barred by the negligence of fellow servants.

On appeal, defendant contends the Act bars this negligence suit against plaintiff's employer; that there is no right to prejudgment interest with respect to this federally created cause; that there can be no recovery for loss of society with respect to this federally created cause; and that plaintiffs had no right to a jury trial.

I.

An understanding of the Act is a necessary foundation to an understanding of defendant's contentions.

As its title shows, the Act is a workers' compensation act. It substitutes no-fault compensation, § 904,[1] for a right to sue, § 905(a).[2] On appeal, defendant contends the exclusivity provisions of § 905(a), which make compensation an employee's exclusive remedy against his employer, bars plaintiff's claim. Plaintiff, on his part, contends the claim is authorized by § 905(b) which permits an employee to sue a vessel owner (here, the owner of the barge) for negligence.

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1 Section 904 provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

2 Section 905(a) provides:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, any anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

On this score both parties seem to agree that the real legal issue is whether § 905(b) permits an employee to sue the vessel's owner when that owner is also the employee's employer. § 905(b) in relevant part provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

Section 905(b) did not exist prior to 1972. In that year, in response to what the House Committee on Education and Labor described as a long overdue need for change, House Committee Report to the 1972 Amendments, H.R. Rep. No. 1441, 92d Cong, 2d Sess., reprinted in [1972] U.S. Code & Cong. Admin. News p. 4698 *et seq.* at 4698, the Act was amended so as to increase the benefits under the Act and eliminate the absolute liability which attached to shipowners under the then existing doctrine of seaworthiness. We resist the temptation to recite the history of the Act, *Seas Shipping Co. v. Sieracki*, 328 *U.S.* 85 (1946), *Ryan Stevedoring Co., Inc. v. Pan Atlantic S.S. Co., Inc.*, 350 *U.S.* 124 (1956), and the 1972 amendment, all of which has been thoroughly set forth at length in the cases to be cited, and limit ourselves to noting that section 905(b) substituted a negligence concept for the strict liability concept of seaworthiness with respect to claims against vessels and insulated the vessels against claims by longshoremen where the injury was caused by another longshoreman, i.e. the vessel is no longer liable for injuries

which are really the fault of the stevedore. H.R. Rep. No. 1441, *supra*.[3]

Prior to the 1972 amendment as a result of the Supreme Court decision in *Sieracki* (vessels liable as third parties for injuries suffered by longshoremen as a result of unseaworthiness, a no-fault liability, even if the condition was created by the stevedore) and *Ryan Stevedoring Co.* (vessel liable under *Sieracki* doctrine could obtain indemnity from the stevedore), the exclusivity provision of Section 905(a) (then the entire section 905) was rendered largely nugatory because the stevedore found itself liable to its employee for compensation benefits under section 933 and again for admiralty seaworthiness action awards as a result of its indemnification liability to the vessel. And in 1963 in *Reed v. The Yaka*, 373 *U.S.* 410 (1963) the Supreme Court held that such admiralty actions could be brought even when the employer and the vessel owner were the same, i.e. the stevedore owned the vessel.

As already noted the 1972 amendment clearly substituted negligence principles for the absolute liability of the unseaworthiness doctrine and abrogated the *Sierecki* doctrine. Relevant to this appeal is the question of whether it abrogated the *Reed* rule.[4] Although presented as novel, we find that the U.S. Supreme Court and three Circuit Courts have held that the *Reed* rule is still viable and that a person covered by the Act may sue the vessel pursuant to section 905(b) even though the vessel is owned by the injured person's employer. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 *U.S.* 523, 530-532 (1983); *Edmonds v. Compagnie Generale Transatlantique*, 443 *U.S.* 256, 266 (1979); *Longmire v. Sea Drilling Corp.* 610 *F.*2d 1342 (5th Cir. 1980); *Napoli v. [Transpacific Carriers, etc.] Hellenic Lines*, 536 *F.*2d 505 (2d Cir. 1976);

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3 By a 1984 amendment, irrelevant to the appeal, immunity was conferred on shipyards by limitations on shipbuilders and repairers. *See Ducrepont v. Baton Rouge Marine Enterprises, Inc.* 666 *F.Supp.* 882, 887 (E.D. La. 1987)

4 Defendant's brief seems to argue *inter alia* that the words "vessel as a third party" shows a legislative intent to limit section 905(b) claims to truly third party actions. This argument is subsumed in the *Reed* issue.

Griffith v. Wheeling Pittsburgh Steel Corporation, 521 *F.*2d 31 (3rd Cir. 1975); *also Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.* 830 *F.*2d 1332, 1338 (5th Cir. 1987). In *Smith v. M/V Captain Fred*, 546 *F.*2d 119 (5th Cir. 1977) the court said, "In this appeal we are asked to decide whether the rule of *Reed v. The Yaka* survived the passage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act" (citations omitted) and answered the question in the affirmative. *Id.* at 120.

Defendant seeks to distinguish the Supreme Court decisions as well as *Napoli* and *Griffith* on the ground that those cases involved longshoreman whereas plaintiff is a harborworker, a non-longshoreman. As the trial judge noted in his oral opinion of July 23, 1990 the language of the statute does not support such a distinction. The first sentence of section 905(b) clearly refers to "person[s] covered by the Act". Plaintiff is acknowledgedly such a person; defendant has made substantial compensation payments to him under the Act. Had Congress intended to mean longshoremen rather than persons covered by the Act, it could have easily said so. Moreover, even if one were to discount those federal cases in which the plaintiff was a longshoreman, there remain opinions from two circuit courts and one district court which uphold a non-longshoreman plaintiff's right to sue the employer-owned vessel. *See Longmire v. Sea Drilling Corp., supra.*; *Smith v. M/V Captain Fred, supra.*; *Presley v. Healy Tibbits Const. Co.*, 646 *F.Supp.* 203 (D.Md. 1986); *also Kerr-McGee Corp. V. Ma-Ju Marine Services, Inc., supra.*

Even if one gives the defendant the best of its longshoreman distinction, defendant asks us to ignore the holding of the Circuit Courts that have spoken on this uniquely federal question and to come to a different conclusion. We decline to do so. We decline to do so not only because the reasoned opinions of these knowledgeable courts as well as the views expressed by the U.S. Supreme Court, in at least related matters, persuade us of the correctness of their decisions but also because we believe it is appropriate to defer to the federal courts in this uniquely federal area. Moreover as noted, we are satisfied defendant's longshoreman distinction does not

exist and that the question is clearly resolved by the continued existence of the *Reed* doctrine.

Finally, we note our agreement with the views expressed by the trial judge as to the interpretation of the Act.

II.

Defendant's remaining contentions are without merit.

A.

Defendant's contention that the court erred in awarding prejudgment interest is without merit. The precise argument made by defendant, including its reliance on *Monessen Southwestern R. Co. v. Morgan*, 496 *U.S.* 330 (1988), was considered and rejected by the Court of Appeal for the Fifth Circuit in *Randolph v. Laeisz*, 896 *F.*2d 964, 968-969 (5th Cir. 1990) (award of prejudgment interest under Texas law in LHCA action upheld). We are satisfied that the discretionary right to award prejudgment interest is generally recognized, *ibid.*; *also Complaint of Connecticut Nat. Bank*, 928 *F.*2d 39, 42-43 (2d Cir. 1991); *Barnett v. Sea Land Services, Inc.*, 875 *F.*2d 741, 746-747 (9th Cir. 1989).

B.

Defendant's contention as to the right of plaintiff's wife to recover damages is also without merit. Section 905(b) preserves a common law cause of action; it does not create one. Moreover, absent a statute-created limitation, courts will not bar the right of a dependent to bring a derivative claim. *See Sea-Land Services v. Gaudet*, 414 *U.S.* 573 (1974).

In recognizing the correctness of the propriety of giving rather than withholding the remedy when the latter result is not required by statute-created limitations, *id.* at 583, Justice Brennan noted, at 588:

> [I]n any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction.

Defendant's reliance on *Miles v. Apex Marine Corp.*, 498 *U.S.* __, 112 *L.Ed.*2d 275 (1990) is misplaced. The court there held that recovery was statutorily precluded by the Death on the High Seas Act (DOHSA), 46 *U.S.C.A.* 761 *et seq.* and the Jones Act, 46 *U.S.C.A.* 688 *et seq. Id.* at 290-91.

C.

As to defendant's contention with respect to the jury trial, it is sufficient to note defendant's concession that "Section 905(b) cases since 1972 have been routinely tried to juries, in both federal and state courts" and that the procedure accords with *Fitzgerald v. United States Lines Company*, 374 *U.S.* 16 (1963).

III.

After the trial, on defendant's motion for a new trial, the trial judge granted a remittitur reducing plaintiff Molli Fanoli's award from $350,000 to $50,000. Molli accepted the remittitur but by virtue of defendant's appeal is entitled to cross-appeal that reduction. *See Mulkerin v. Somerset Tire Services, Inc.*, 110 *N.J. Super.* 173, 177 (App. Div. 1970).

The rule is well established that a trial judge should not disturb a damage award unless it is "so disproportionate to the injury and resulting disability shown as to shock [the] conscience." *See Ryan v. KDI Sylvan Pools Inc.*, 121 *N.J.* 276, 297 (1990); *Baxter v. Fairmount Food Co.*, 74 *N.J.* 588, 596 (1977).

From a review of the record which discloses substantial harm visited on Molli by her husband's injuries, we are not satisfied the award was so large as to be manifestly excessive.

We are not persuaded that the reasons given by the trial judge in his oral opinion of July 23, 1990 justify such a conclusion. *See Baxter v. Fairmount Food Co., supra* at 601.

The judgment in favor of John Fanoli is affirmed. The order reducing the award to Molli Fanoli is reversed and the matter remanded for entry of a judgment for the full amount of the jury award together with pre-judgment interest to be calculated in accordance with the rules of the court.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. EMILE COX
Clerk

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Attorney for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

DOCKET NO: L-082810-87
CIVIL ACTION

JOHN FANOLI and MOLLI FANOLI, his wife

Plaintiffs,

vs.

SEA-LAND SERVICES, INC., a corporation doing business in the State of New Jersey

Defendants,

ORDER FOR JUDGMENT

The trial of the within liability personal injury law suit having commenced on Wednesday June 13, 1990 before the Honorable A. Donald McKenzie with Joseph A. Ginarte, Esq., by Richard M. Winograd representing the plaintiffs Fanoli and Kenny, Stearns & Broderick by Joseph T. Stearns representing defendant Sea-Land Services, Inc. and

the jury having returned with a verdict on Monday, June 18, 1990 in favor of plaintiff John Fanoli in the amount of $900,000.00 (Nine hundred thousand dollars) and in favor of plaintiff, Molli Fanoli, in the amount of $350,000.00 (Three hundred and fifty thousand dollars), and

the Court having noted that the accident in question occurred on June 27, 1986 and that the Complaint was filed on June 23, 1987, and

the Court having further noted that plaintiff John Fanoli has been previously reimbursed $106,345.50 in medical expenses and $75,022.84 in lost wages for a total of $181,368.34;

And good cause appearing therefore,

NOW THEREFORE, it is Ordered that Judgment be and the same hereby is entered in favor of plaintiff John Fanoli and against defendant Sea-Land Services, Inc. in the aggregate amount of $883,796.92 (Eight hundred eighty three thousand seven hundred ninety six dollars and ninety two cents) consisting of the jury verdict award of $900,000.00 (Nine hundred thousand dollars) reduced by the sum of $181,367.34 previously paid on behalf of defendant to plaintiff with prejudgment interest on the balance of $718,631.66 (Seven hundred eighteen thousand six hundred thirty one dollars and sixty six cents) or $165,165.26 (One hundred sixty five thousand one hundred sixty five dollars and twenty six cents); and

It is further Ordered that the amount of $181,368.34 (One hundred eighty one thousand three hundred sixty eight dollars and thirty four cents) reduced from the jury verdict award to John Fanoli is to be credited to John Fanoli to reduce the amount of any compensation liens asserted against this judgment pursuant to 33 U.S.C. Section 933; and

It is further Ordered that Judgment be and the same hereby is entered in favor of plaintiff Molli Fanoli against defendant Sea-Land Services, Inc. in the aggregate amount of $61,490.00 (Sixty one thousand four hundred ninety dollars) consisting of the jury verdict award of $350,000.00 reduced on remittitur granted by the Court to the amount of $50,000.00 plus prejudgment interest in the amount of $11,490.00; and

It is further Ordered that a copy of this Order, executed on this 1st day of August, 1990 shall be served upon counsel for the defendant Sea-Land Services, Inc. within 7 days of the date of this Order.

DATED: 8/1/90

/s/ A. DONALD MCKENZIE
HONORABLE A. DONALD MCKENZIE

33 U.S.C. Sec. 902(21)

* * * * *

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

* * * * *

33 U.S.C. Sec. 905

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333

of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

33 U.S.C. Sec. 933(a)

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * * * *

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

P.L. 92-576, see page 1452

Senate Report (Labor and Public Welfare Committee)
No. 92-1125,
Sept. 14, 1972 [To accompany S. 2318]

House Report (Education and Labor Committee)
No. 92-1441,
Sept. 25, 1972 [To accompany H.R. 12006]

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

Senate September 14, October 14, 1972
House October 14, 1972

The House Report is set out.

HOUSE REPORT NO. 92-1441

The Committee on Education and Labor, to whom was referred the bill (H.R. 12006) to amend the Longshoremen's and Harbor Workers' Compensation Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

PURPOSE AND BACKGROUND OF LEGISLATION

Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70 a week. Today, the average longshoreman's or ship repairman's wage is over $200 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is needed. Although employer groups

indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen. (House Committee Report to the 1972 Amendments, House Rep. No. 1441, 92d Cong., 2d Sess. reprinted in [1972] U.S. Code Cong. Admin. News, p. 4698 *et seq.* at p. 4698-4699.)

* * * * *

H.R. Rep. No. 1441

ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 25[1] (1946) which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips

1 66 S.Ct. 872, 90 L.Ed. 1099.

and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124[2] (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

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2 76 S.Ct. 232, 100 L.Ed. 133.

The Committee has also taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reasons to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. *Crumedy* vs. *The J. H. Fisser*, 358 U.S. 423.[3] *Albanese* vs. *Matts*, 382 U.S. 283.[4] *Skibinski* vs. *Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work. *A. N. G. Stevedores* vs. *Ellerman Lines*, 369 U.S. 355.[5] *Blassingill* vs. *Waterman SS Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co.* vs. *Peterson*, 347 U.S. 396.[6] *Italia Societa* vs. *Oregon Stevedoring Co.*, 376 U.S. 315[7], or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel

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3 79 S.Ct. 445, 3 L.Ed.2d 413.

4 86 S.Ct. 429, 15 L.Ed.2d 327.

5 82 S.Ct. 780, 7 L.Ed.2d 798.

6 74 S.Ct. 601, 98 L.Ed.2d 798.

7 84 S.Ct. 748, 11 L.Ed.2d 732.

put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act

by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed* v. *S.S. Yaka*, 373 U.S. 410[8] (1963) and *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 371[9] (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the

common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable. (H.R. Rep. No. 1441, *supra*, at p. 4701-4705).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO. L-082810-87

Union County Courthouse
Elizabeth, New Jersey,
MAY 21, 1989.

FANOLI,

Plaintiff,

—VS.—

SEA-LAND SERVICES,

Defendant,

BEFORE:

Hon. BURTON J. IRONSON, J.S.C.,

APPEARANCES:

KENNY, STEARNS & BRODERICK, ESQS.
BY: JOSEPH T. STEARNS, ESQ.
Attorneys Plaintiff[

RICHARD M. WINOGRAD, ESQS.
Attorney for the Defendant[,

B. PETER SLUSAREK, C.S.R., XI00291
Official Court Reporter

DECISION ON MOTION

THE COURT: Very interesting case.

The plaintiff in this matter is suing his employer, Sea-Land Services, who is the owner of a vessel which is described as a barge bearing the name of Chesapeake Trader. Plaintiff is suing for negligence in the happening of a accident that occurred on June 27, 1986,. His cause of action is based on the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. section 905 B which permits a cause of action sounding in negligence against the employer-ship owner, for vessel-related negligence provided that the injured employee was performing services as a longshoreman or stevedore at the time of the accident. It's being alleged by the defendant that the plaintiff has no standing to assert the claim because he was not a longshoreman or stevedore and because there was no vessel related negligence.

The defendant contends that the plaintiff's exclusive remedy is under section 905 A of the act for which plaintiff has already made claim and has received and is receiving payments.

Defendant through it's certifications contends that the plaintiff was working in a shore gang which had been assigned to inventory lashing gear used to secure cargo containers. The defendant supplied ladders to the shore gang personnel as a connecting device on to the vessel, but defendant contends that the ladders are not part of the regular equipment of the vessel and that the shore gang members are employed to perform routine maintenance oriented tasks aboard the vessels, and they do not engage in loading or unloading cargo.

It's further contended that the Chesapeake had no crew at the time of the accident and, therefore, the plaintiff was performing a function the crew normally would undertake. As an additional facet of defendant's argument, that the plaintiff was not performing stevedoring or longshoremen duties at the time of the accident.

The defendant also contends that the plaintiff was not a member of the International Longshoremen's Association

but, rather, was a member of the Seafarers International Union whose members are, among other things, to perform routine maintenance aboard ships in port and never are supposed to handle longshoremen duties. Defendant also asserts that by reason of a general cargo agreement between New York Shopping Association Incorporated and the I.L.A. that the right to perform traditional longshoremen work is exclusively for I.L.A. members and, therefore, the plaintiff by union rule is jurisdictionally prohibited from doing any work that would be done by lashers or one of a regular longshore gang.

In opposition to the motion plaintiff has alleged in his affidavit that on the day of the accident he and two other shore gang members were asked by Mr. Veshi to board the Chesapeake to inventory the gear necessary for securing the containers. Mr. Veshi in his certification described himself as the defendant's vessel manager at Port Elizabeth.

Plaintiff in his affidavit in paragraph five states that the type of work that he was performing was of a type that would have usually been done by lashers or one of the regular longshoring gangs. He alleges in paragraph six of the affidavit that the ladder which was found at the edge of the dock was a ladder which was being used by the lashers and longshoremen to go on and off the barge. In paragraph seven he alleges that the at the time of the accident an unloading operation was underway, and in paragraph eight he contends that prior to attempting to ascend the vessel he observed lashers and longshoremen use the same ladder to climb aboard the Chesapeake. He, therefore, contends that he was performing a longshoreman function in inventorying the gear, and that the accident was vessel related negligence in failing to supply a proper and safe way of getting aboard the barge.

He contends that as he was about halfway up the ladder the vessel listed because of the movement of the cargo containers causing him to fall off the ladder and as a result he landed in the water between the dock and the barge sustaining what appears to be considerable injuries.

Because the Court must accept as true all of the evidence which supports the plaintiff, and must accord him the benefit

of all legitimate inferences which can be deduced therefrom, the Court is of the opinion that the minds of reasonable persons could differ as to whether or not the plaintiff was in fact performing longshoremen duties at the time of the accident and whether or not there was owner vessel related negligence in failing to provide safe access to the barge by the use of the unsecured ladder.

Even though the plaintiff may not have been a member of the I.A.L., if he was performing duties on instructions of the defendant that are usually performed by a longshoreman, if that is so the defendant can't complain that the plaintiff was not a longshoreman by title, if in fact he was performing longshoremen duties at the request of the defendant at the time of the accident.

So, therefore, I believe that there are genuine issues of fact that are present at this time, and for those reasons I must deny the motion for summary judgment.

* * * * *

Notice of Motion for an Order Striking Plaintiffs'/ Respondents' Jury Demand (dated 4/11/90)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—UNION COUNTY

Docket No.: L-082810-87
Civil Action

JOHN FANOLI and MOLLI FANOLI, his wife,

Plaintiffs,

—against—

SEA-LAND SERVICES, INC., a corporation doing business in the State of New Jersey and JOSEPH VINYL SHIP MAINTENANCE COMPANY, a corporation doing business in the State of New Jersey and JOHN DOES (fictitious),

Defendants.

NOTICE OF MOTION

TO: JOSEPH A. GINARTE, ESQ.
Attorneys for Plaintiffs
744 Broad Street
Newark, NJ 07102
(201) 643-4666

SIRS:

PLEASE TAKE NOTICE, that at the trial of this matter scheduled to begin on the 16th day of April, 1990, at 9:00 in the forenoon or as soon thereafter as counsel can be heard, the undersigned, attorneys for defendant SEA-LAND SERVICES, INC. will apply to the Honorable A. Donald MacKenzie at the Superior Court, Law Division, Union County,

at the Courthouse, Elizabeth, New Jersey for an order striking plaintiff's jury demand.

PLEASE TAKE FURTHER NOTICE, that counsel shall reply upon the brief submitted in support of this Motion;

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 4:42-1(C) a proposed form of Order is annexed hereto.

Dated: Newark, New Jersey
April 11, 1990

KENNY, STEARNS & BRODERICK
Attorneys for Defendant

By: _____
JOSEPH T. STEARNS

Order Reinstating Plaintiffs'/Respondents' Jury Demand (dated May 29, 1990)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—UNION COUNTY

Docket No. L-082810-87
Civil Action

JOHN FANOLI and MOLLI FANOLI, his wife,

Plaintiffs,

—VS.—

SEA-LAND SERVICES, INC., et als.

Defendants,

ORDER

This matter having been brought before the Court on Short Notice of Motion by Joseph A. Ginarte, Esq., (Richard M. Winograd, Esq., appearing) for an Order vacating this Court's Order of May 11, 1990 and the Court after considering the opposition of defendant, Sea-Land Services, Inc., (Joseph T. Stearns, Esq., appearing) and good cause having been shown;

It is on this 29th day of May, 1990;

ORDERED, that this Court's Order of May 11, 1990 striking the plaintiff's jury demand be and the same is hereby vacated; and it is

FURTHER ORDERED, that plaintiff's jury demand is hereby reinstated.

/s/ A. DONALD MCKENZIE
A. DONALD MCKENZIE, J.S.C.

Excerpts from Trial Transcript of Defendant/Petitioner's Motion to Dismiss at the Conclusion of Plaintiff's Case, June 14, 1990

* * * * *

MR. STEARNS: Your Honor, the defendant moves to dismiss the complaint on the grounds that plaintiff because of his job capacity doesn't have standing to maintain this action under what is the exclusive remedy of people covered by the Federal Longshore and Harbor Workers Compensation Act.

The defendant contends that the only persons who may maintain actions against their employer under the Act's exclusive remedy, which is in Section 905(b), are longshoremen, people providing stevedoring services to the vessel.

* * * * *

This question is a matter of finding an exception to the general rule, as I have stated previously, that an employee in receipt of compensation cannot sue his employer.

(Trial Transcript, p. 821).

* * * * *

MR. WINOGRAD: For the 905(b) exemption to apply in any event the injured worker and the negligent employee must both have been performing the same function, whether it be longshoring, ship building, repair work, or some other task.

(Trial Transcript, p. 835-836).

* * * * *

THE COURT: Of course, he is saying that's what should have happened back when he brought the motion before Judge Ironson. Let me deal with that for a moment. And probably very quickly.

And you are still on your feet.

Judge Ironson denied summary judgment because he said there was a question of fact as to whether the plaintiff here was acting in the capacity of a longshoreman at the time. I don't see any issues of fact at all here. I think the defendant

here would even accept the circumstances and the work that he was supposed to be doing based on what we have already heard, including part of captain Vesci's deposition, which doesn't raise any issue of fact. He wanted somebody to count turnbuckles on the Chesapeake Trader and went to the bosun, and Mr. Hall picked three members of the shore gang to do that work. And that's the circumstances under which Mr. Fanoli was injured.

I don't see any issues of fact here. It's just interpretation of construction as to whether that work was the work of a longshoreman or not.

Are you still contending—or, I don't know, perhaps you didn't before, you tell me. Are you claiming in the alternative that even if he is not eligible because he is not a longshoreman under the act—strike that. If you are claiming that even if, as a member of the shore gang, he wasn't entitled to bring this suit, that nevertheless he was in fact a longshoreman at the time and, therefore, is covered as one having the right to sue under the Act?

MR. WINOGRAD: No, your Honor. I don't dispute that he was not hired by the vessel to perform stevedoring services. I didn't mean to be confusing by trying to put on evidence of that. Because I can't, I don't know the answer to whether or not if he was actually doing longshoring work at the time may really have an impact on the law in that area, if your Honor ever found in Mr. Stearns' favor on that point. I don't believe that Judge Ironson ever addressed the issue we are now addressing because he didn't have to. There were some affidavits submitted indicating that it was possible he could be doing longshoring work, in which case he never really has to get to the threshold question of whether or not that makes any difference.

THE COURT: Well, I don't believe there is any issue of fact here for a jury. And I am satisfied from the evidence that he was not a longshoreman, and was [not] acting in the capacity of a longshoreman at the time. That is crew work basically. He was a member of shore gang, replacing those that would, those in the crew part, in the crew of the ship that would

ordinarily do that. Longshoremen don't count turnbuckles or maintain them.

So that issue has been addressed and disposed of.

(Trial Transcript, p. 843-845).

* * * * *

MR. STEARNS: . . . [W]hat I said was the only person who can sue his employer is a longshoreman. Now, anybody covered under the statute can sue any [vessel] tortfeasor as a third party. That's why the first sentence, first sentence has the provision in accordance with the provision of section 933. Which again is the section that says, if the injured employee determines that it was caused by the negligence of somebody other than his employer or his co-employee. What I am saying is anybody covered can sue a third party [vessel].

(Trial Transcript, p. 847).

* * * * *

MR. STEARNS: . . . The basic position we take is that the second sentence is [an] enabling statute. In other words, that's the section that permits the variation from what is generally provided in 905(a) [and it] is not limitation, it's an enablement. And the situation is clear from the congressional documents in 1972 where they say Congress recognized needs for special provision by, for longshoremen and repair men . . . to sue their employer.

(Trial Transcript, p. 848-849).

* * * * *

Excerpts from Transcript of Oral Argument of Defendant's/Petitioner's Motion for Judgment N.O.V. (July 23, 1990)

* * * * *

MR. STEARNS: . . . As the court is aware, the first sentence of this federal statute makes reference to the right of all covered employees to sue the vessel as a third party in accordance with provisions of Section 933 of the Act.

The second sentence says in the event of injury to a person employed by the vessel to provide stevedoring services, no such action shall be maintained in the event that the negligence was caused by the negligence of others.

* * * * *

The analysis has to be, most respectfully, that if someone other than a Longshoreman can sue, the right to sue has to be conferred by the first sentence of the Act, the first sentence of 905B.

The simple reason for that is the second sentence refers to people employed by the vessel to provide stevedoring services and then provides for so-called defense in the event that the negligence causing the injury is wholly that of others employed in the same capacity i.e., to provide stevedoring services for the vessel.

So the question is does the first sentence of Section 905B provide the right and does the second sentence limit it.

(Motion transcript, p. 6-7)

* * * * *

THE COURT: But, if the vessel acts as its own stevedore, the longshoreman is not barred from recovering from the vessel?

MR. STEARNS: That's correct. But, I'm using this case for the analysis of the question of whether or not the first sentence can possibly be read as supplying a right which is curtailed or which is limited in the second sentence because the analysis of this question as it applies to a non-longshoreman must begin with the judgment by the court that the first sen-

tence is the source of rights other than to sue as a third party.

(Motion transcript, p. 9)

* * * * *

MR. STEARNS: . . . The first sentence applies to third party rights. The second sentence . . . is congress' preservation of the rights of Longshoremen employed by the vessel to maintain such an action.

(Motion transcript, p. 12-13)

* * * * *

MR. STEARNS: So by reference to the congressional documents which contain a special provision, it is perfectly plain, one, that a longshoreman can sue his employer despite receiving compensation. And, two, that the congress of the United States in amending the Longshoremen and Harbor Workers' Compensation Act in 1972 intended as a special provision to provide only for a suit between '72 and '84 for longshoremen and ship repairers[; and] since 1984 for a suit by longshoremen only against their employer.

(Motion transcript, p. 15)

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THE COURT: Mr. Stearns, I think I've heard enough. Let me see if I've got you right. Pressley [*Presley* v. *Healy Tibbitts Const. Co.*, 646 F. Supp. 203 (D.Md. 1986)] indicates the sentence, the second sentence of 905B in effect to be a limitation. You say it's an expansion really in favor of longshoremen?

MR. STEARNS: It's a preservation of a right [to sue for damages] to longshoremen only.

THE COURT: That others do not have?

MR. STEARNS: That others do not have.

(Motion transcript, p. 16)

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MR. STEARNS: . . . I appreciate the opportunity to say it again at the length I've taken. The first sentence is the third party right. It can't mean anything else because it contains

the language, may suit the vessel "as a third party in accordance with the provisions of Section 933."

Now, 933 is a Section that says liability for compensation when third persons are liable. The first is Section 933, 933A requires a determination by the injured employee that someone other than his employer or his employer's employees are responsibility in negligence for his injury. So, . . . [this] can't be a first sentence . . . suit . . . against a third party. You can't sue your employer as a third party, and there can't be a first sentence suit in accordance with Section 933 which has a threshold that requires a determination that someone other than your employer was liable.

(Motion transcript, p. 17-18)

* * * * *

MR. STEARNS: . . . There was a question you asked me during the course of the trial whether I was urging that the jury should be charged that negligence of other people in a capacity in the shore gang didn't count and I said no, it's not in the statute. You indicated that you agreed. And no such charge was made.

THE COURT: Now, you're urging that to be error?

MR. STEARNS: No, I'm using the word error in quotations and there's a reason for that because most certainly it is not error but it gets back to the first point. The reason there is no so called defense[,] that is there's no provision in the second sentence for in the event of injury to a person employed by the vessel to act in the shore gang, no such injury caused by the negligence of others in the shore gang can be maintained.

THE COURT: Mr. Stearns, I've got to cut you off. I agreed with you at the time and it's still my opinion that that limitation applies by its own language strictly to longshoremen.

MR. STEARNS: Absolutely.

THE COURT: We all know that Mr. Fanoli was not a longshoreman.

(Motion transcript, p. 18-20)

* * * * *

MR. WINOGRAD: Your Honor, I'll just briefly agree with your original assessment. Mr. Stearns basically says there is no support for his view of the statute. Except if you—

THE COURT: Except reason, except common sense and the purpose of congress and some of the language in Edmonds and Jones and Laughlin against Pfeiffer.

(Motion transcript, p. 20)

* * * * *

THE COURT: Let's make it clear before you go on. This in the certainly not commonly understood context is a not a third party suit. Fanoli was employed by Sea Land which is the owner or charter of the vessel, correct?

MR. WINOGRAD: This is correct, your Honor. I'm using the term rather loosely because the courts do, they create a fiction that it is in fact a third party suit.

(Motion transcript, p. 23)

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MR. WINOGRAD: . . . And, the Jones and Laughlin case simply said, no, we're not going to do that. We're going to create a fiction.

(Motion transcript, p. 24)

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THE COURT: Thank you. It's interesting to this Court in this rather novel field because most of the law on the subject is in the Federal venue, not only the statute in question but the decisions that Counsel and the Court have I believe exclusively combed the decisional law for some clearcut interpretation of this section of the code and none has been forthcoming. Therefore, I'm simply going to go by basics.

The section in question starts out, "In the event of injury to a person covered under this chapter caused by the negligence of a vessel then such person or anyone otherwise entitled to recover damages by reason thereof may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title."

Now, the argument of the defense is that that really is limited to longshoremen. But, it doesn't say that. It says anyone covered under this Act and we're talking about the Longshoremen and Habor [sic] Workers' Compensation Act which includes Harbor Workers other than Longshoremen.

Then we have these series of cases Pressley [*Presley, supra*] has been mentioned and [Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)] and others in which persons other than longshoremen have brought these types of actions and their right to bring those actions has not been challenged, apparently, so far as the opinions are concerned by the defendants in those cases.

I grant Mr. Stearn's argument that is that interpretation is not completely consistent with good sense in view of the apparent intention of congress to limit liability of employers by reason of the fact that the Compensation Act is so liberal meaning to limit the liability to specific situations. But, my reading of the statute and my reading of the cases doesn't bear out that interpretation.

My belief is that the statute here grants the right to bring an action based on negligence of the vessel such as what is brought here and that's regardless of the employer or employee relationship that may exist. And the exceptions follow, and I believe they are exceptions, that namely longshoremen cannot sue where the negligence is that of a fellow longshoreman, although he is not barred simply because he's the employee of the owner of the vessel which supplies its own stevedoring services.

And the second exception is that of shipbuilders and ship repairers who are not granted the right to sue and there's a specific community there, even if the employer is the owner of the vessel. The Pressley [*Presley, supra*] and other cases in, effect, by not ruling otherwise, have allowed these other workers, other harbor workers, to bring these suits and I'm satisfied that that construction is the proper one. Certainly there's no cases to the contrary.

I recognize this is a case from the outset that will probably go up on appeal no matter which way the decision goes. So

maybe we'll get the clarification that is lacking as of this time.

(Motion transcript, p. 26-28)

* * * * *

THE COURT: . . . As to interest, it comes down to this, while prejudgment interest is not specifically covered in the Federal statute, I do read the bottomline was a matter within the Court's discretion. The fact that there is some authority for not granting prejudgment interest on future damages, it does not apply here because our verdicts include not only past and present but future damages and there's no way to sort out how much of an award was for future damages, disability, pain and suffering and the like.

And, since our statute, our rule provides for prejudgment interest as to all parts of the award, I'm going to allow the prejudgment interest in this case based on the same provisions as incorporated in our rule.

(Motion transcript, p. 31)

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Excerpt from p. 25 of Brief of Plaintiff-Respondents to the Superior Ct. of N.J., Appellate Division

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The language used in the first sentence is "as a third party" which is significant in that it intentionally utilizes the device of simile.

* * * * *

Excerpts from Petitioner's Brief to the Superior Ct. of N.J., Appellate Division

* * * * *

Defendant-appellant claims . . . that the first sentence of Section 905(b) applies to what has been characterized as the "usual situation", one where the shipowner (i.e., "vessel") engages an independent contractor to load or unload; and provides right to sue *only third-party* vessels for negligence. It says that this interpretation is mandated by the first sentence requirement that such suits be brought against "the vessel as a third-party in accordance with the provisions of Section 933", a section of the Act which applies only in the event ". . . the person entitled to . . . compensation determines that some person other than the employer or a person or persons in his employ is liable in damages" (33 U.S.C. Section 933(a)). Defendant-appellant also contends that the Section 905(b) second section applies *only* in instances when the vessel directly employs its own longshoremen to load and unload its vessels. Defendant thus asserts that the proper statutory construction requires that the first sentence of the Section be seen wholly inapplicable to the issue of plaintiffs' right to sue, because John Fanoli *cannot* sue his employer "as a third-party in accordance with the provisions of Section 933". Defendant further urges that the second sentence is, by its terms, inapplicable to harbor workers other than longshoremen, and as a result only longshoremen (and under the Act as it provided between 1972 and its most recent amend-

ment in 1984, ship repairment and shipbuilders) since 1972 have ever been entitled to sue a vessel-employer.

(Appellate Division Brief, p. 21-22).

* * * * *

In short, there can be doubt that upon any careful analysis it is certain that the first sentence of Section 905(b) creates only a right of all covered employees to sue a vessel which *is* a "third-party".

(Appellate Division Brief, p. 27).

* * * * *

Applying the New Jersey rule of interest in a federal statutory rights case is unquestionably disobedient to Supreme Court precedent. In *Monesson Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 100 L.Ed. 2d 349, (1988), less than three years ago, the Supreme Court held that a state rule of prejudgment interest cannot be given effect in federal statutory rights cases. . . . [and] [t]here can be no award of prejudgment interest under state law in a Section 905(b) case as a similar matter of federal preemption.

(Appellate Division Brief, p. 43).

* * * * *

The pre-judgment interest award, because it was assessed under New Jersey law in this case, simply cannot stand. There is *no* "discretion" to give this State's law effect, obviously. This is *perfectly* plain from *Monesson Southwestern Ry. Co. v. Morgan*, *supra*.

(Appellate Division Brief, p. 44).

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There has never been any Section 905(b) case, or any general maritime law case, which has awarded interest on *future* damages, as the law of the State of New Jersey provides. Thus, in *Hernandez v. M/V Rajaan*, 841 F.2d 582, at 590-91 (5th Cir. 1988), a case upon which plaintiffs relied in the court below, that plaintiff *conceded* in oral argument on

appeal of that Section 905(b) case that interest on future damages could *not* be awarded.

(Appellate-Division Brief, p. 45).

* * * * *

Finaily, in *Miles v. Apex Shipping Co., Inc., supra*, the Supreme Court held that maritime law remedies cannot supplement federal statutory rights. The contrary is exactly the holding of the cases (decided before *Miles*) awarding maritime law pre-judgment interest, i.e., interest from the time of loss until verdict, in Section 905(b) cases. In short, *there can be* no pre-judgment interest awarded in this case.

(Appellate Division Brief, p. 46).

* * * * *

Section 905(b) does not provide for recovery of damages for loss of society. Since the Supreme Court in *Miles v. Apex Shipping Co., Inc., supra*, at 112 L.Ed. 2d 291 held that: "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault that Congress has allowed in cases . . . resulting from negligence. . . .", it must be assumed that recovery for loss of society in a Section 905(b) case depends exclusively upon the existence of a basis for such an award established by statute . . . [and] if non-pecuniary damage recovery is not available to seamen's spouse, it is not available to wives of longshoremen as well.

(Appellate Division Brief, p. 46-47).

* * * * *

In light of *Fitzgerald* [Fitzgerald v. U.S. Lines Co., 374 U.S. 16 (1963)] . . . it is appropriate that the issue of jury trial rights in these cases should be decided by the Supreme Court, and this issue is raised for purposes of preserving it for possible ultimate appeal. It appears that the law as expressed in *Fitzgerald* is that the question *can be* settled, in any event, *only by* the United States Supreme Court.

(Appellate Division Brief, p. 50).

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Excerpt from petitioner's trial court brief in further opposition to respondents' claim for pre-judgment interest. Re: Federal Pre-emption

This title 33 U.S.C. Section 905(b) case is controlled by federal law with respect to pre-judgment interest. *Monessen Southwestern Railway v. Morgan*, 486 U.S. 330, 108 S. Ct. 1837 (1988). Section 905(b) represents exercise by the Congress of the United States of its authority over Admiralty and Maritime matters.

* * * * *

Excerpts from Defendant/Petitioner's Petition for Certification to the Supreme Court of New Jersey (filed and served on Nov. 27, 1991 pursuant to New Jersey Rule Governing Appellate Practice 2:12-7(b))

* * * * *

QUESTIONS PRESENTED

1. Is suit by an Act covered employee who is not a longshoreman authorized by 33 U.S.C. Section 905(b) and if suit were said to be authorized, should defendant be given a new trial in order to present an alleged defense of fellow servant negligence?

2. If plaintiffs can sue, can plaintiff Molli Fanoli in her Section 905(b) cause of action recover damages for loss of society; and, if so, in what amounts?

* * * * *

4. Can pre-judgment interest be awarded in this federal law case under the New Jersey "rules of court" and can pre-judgment interest for future damages be awarded?

5. Are plaintiffs entitled to trial by jury?

ERRORS COMPLAINED OF

1. The Appellate Division improperly concluded that an Act covered employee who is not a longshoreman can sue his employer despite receipt of compensation.

2. The Appellate Division improperly held that defendant had abandoned a defense of "fellow servant negligence" which the trial court ruled did not exist; and as a result avoided the question, presented in the alternative, of defendant's right to a new trial.

3. The Appellate Division in error concluded that the Act permits recovery of damages for loss of society and, if such damages are recoverable at all it erred in concluding that the applicable federal law permits award in an amount as large as the jury verdict in Molli Fanoli's favor.

4. The Appellate Division disobeyed the Supreme Court's ruling in *Monesson Southwestern Railway Company v. Morgan*, 486 U.S. 330 (1988), and improperly awarded pre-judgment interest; and in any event, improperly allowed pre-judgment interest on some never established amount for future damages.

5. The Appellate Division held that plaintiffs were entitled to a trial by jury.

(Petition, p. 4-5).

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Paragraph 15 of Sea-Land Services, Inc.'s Answer to the Complaint (dated April 28, 1988)

* * * * *

AFFIRMATIVE DEFENSES ON BEHALF OF DEFENDANT SEA-LAND SERVICES, INC.

FIRST DEFENSE

15. Plaintiffs' suit is barred by provision of the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.*, §905.

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